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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS ROBERTO VENTURA,

Defendant and Appellant.

B214383

(Los Angeles County
Super. Ct. No. BA342707)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Anne H. Egerton, Judge. Affirmed in part; reversed in part.

Cindy Brines, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Carlos Roberto Ventura of burglary, making a criminal threat and inflicting corporal injury on the mother of his child. The trial court sentenced Ventura to a term in prison and ordered him to pay \$400 into domestic violence funds under Penal Code section 1203.097. We strike the latter order and affirm the judgment as modified.

FACTS AND PROCEEDINGS BELOW

Ventura challenges his conviction for making a criminal threat and the order to pay into the domestic violence funds. The facts relevant to his criminal threat conviction are as follows:

The victim, Sara C., testified that on June 9, Ventura called her and left messages that he wanted to see his daughter, Ashley. In his last message at approximately 10:30 or 10:40 that evening Ventura “threatened that if he had to kill me to see his daughter, that he would do that.”¹ Upon hearing this threat, Sara “got very scared” and immediately moved Ashley and her other daughter from their bedroom to the bedroom occupied by one of her roommates. Just as Sarah got the children into the other bedroom, Ventura entered the house by breaking the living room window. Ventura began kicking her on her buttocks, head and chest and yelled “that he would kill [Sara] and take his daughter away.” Sara’s other roommate was in the living room when Ventura broke in. She witnessed him beating Sara but did not hear him threaten to kill her.

DISCUSSION

I. FAILURE TO GIVE A UNANIMITY INSTRUCTION ON THE CRIMINAL THREAT COUNT

“When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either

¹ It is not clear from the record whether Ventura made this threat at 10:30 or 10:40 p.m. or whether he made it earlier and Sara heard it as a recorded message at 10:30 or 10:40 p.m. Because the former interpretation of the evidence supports the judgment by not requiring a unanimity instruction (see discussion below) we adopt that interpretation.

the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.]” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534; and see *People v. Salvato* (1991) 234 Cal.App.3d 872, 880 [court has a sua sponte duty to instruct on unanimity when no election has been made].)

Here, the prosecution charged Ventura with one count of making a criminal threat but presented evidence of two such threats: the telephonic threat “that if he had to kill [Sara] to see his daughter, that he would do that” and the threat made inside the house “that he would kill [Sara] and take his daughter away.” The prosecution did not identify which threat it was relying on to support the charge. Therefore, Ventura contends, the court should have sua sponte instructed the jury that it had to unanimously agree as to which threat constituted the one offense charged.

Ventura relies on *People v. Melhado, supra*, in which the defendant threatened at 9:00 or 9:30 a.m. to go home and ““bring a grenade”” to ““blow . . . away”” the victim and made a second threat at 11:00 a.m. the same day to ““blow up this place”” and ““blow”” the victim ““away.”” (60 Cal.App.4th at p. 1533.) The Court of Appeal reversed the defendant’s conviction finding that both threats were sufficient to establish liability and therefore it could not “say that, beyond a reasonable doubt, each of the 12 jurors agreed unanimously that the same act constituted the commitment of the crime.” (*Id.* at p. 1539.)

The People maintain a unanimity instruction was not required because the threats were so closely connected in time as to constitute one transaction and Ventura offered the same defense to both alleged acts. (*People v. Ervine* (2009) 47 Cal.4th 745, 788.) The People further contend that where “the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless.” (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.)

We cannot say from the record that the telephone threat and the in-person threat were so closely connected in time that they constituted a single transaction. Therefore, it was error not to give the unanimity instruction. Nor can we say that failure to give the instruction was harmless under either the *Watson* or *Chapman* standard of review. Some jurors could have believed Sara's testimony that Ventura left a death threat on her cell phone and rejected her uncorroborated testimony that he threatened to kill her after he broke into the house.

II. DEPOSIT TO DOMESTIC VIOLENCE FUNDS

At the time of Ventura's convictions Penal Code section 1203.097 provided that "(a) [i]f a person is granted probation for a crime in which the victim is a person defined in section 6211 of the Family Code, the terms of probation shall include all of the following: . . . [¶] (5) [a] minimum payment by the defendant of four hundred dollars (\$400) to be disbursed as specified in this paragraph." Ventura was not granted probation. Therefore, section 1203.097 is not applicable to him. The People concur.

DISPOSITION

The conviction for making a terrorist threat is reversed and the judgment is modified to strike the order that defendant pay \$400 into domestic violence funds under Penal Code section 1203.097. The cause is remanded to the trial court for resentencing and to prepare an amended abstract of judgment and to forward a copy thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.